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PROPERTY INVIOLEABLE:

OR, SOME

REMARKS

April 6 UPON A *1736*

PAMPHLET

ENTITLED,

PRESCRIPTION SACRED.

O magna vis veritatis, quæ contra Hominum ingenia, calliditatem, solertiam, contraque fides omnium insidias, facile se per seipsam defendat.
Cic. pro Cœlio.



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Property Inviolable, &c.

AS there are some things in the Pamphlet mentioned in the Title Page, which have a Tendency to weaken Property in general; and as it is the Business and Duty of every Man in a free Country, to assert the Rights of his fellow Subjects; I thought it incumbent upon me to publish the following Remarks: Wherein I have considered the Clergy meerly in their *Temporal* not in their *Spiritual* Capacity; not as *Clergymen* but as *Subjects*. I hope I have considered the matter impartially. I can assure the World, there is no Bias of Interest upon my Mind: I am neither *Clergy-man*, *Impropiator* nor *Lay-Patron*: Nor have I any Sort of Interest, in any kind of Tythes whatsoever.

As far as I have been able to discern the meaning and Intention of the Author, in the Pamphlet above mentioned, It is to shew, That the Clergy of *Ireland* have no *legal* Right to Tythe of Agistment: That at best, their Right is extremely doubtful; and that, whatever Right they may have in this Case, the Legislature may very justly take it away.

I shall first Endeavour, to shew, that the Clergy of *Ireland* have an undoubted Right to the Tythe in Question, both by the *Common* and *Statute-Law*, and shall then consider the Author's Objections.

It was never doubted that Tythe of Agistment is due in *England* by the *Common-Law*. The Law Books are full of Authorities to that Purpose; and it is not pretended that there is any One Authority to the contrary. Whence it evidently follows, that it is due in *Ireland* by the same *Common-Law*. For the *Common-Law* of *England*, by being Introduced here, has utterly abolished the *Antient Customs*, or *Common-Law* of *Ireland*: The former has been substituted in place of the latter, and is become the *Common-Law* of *Ireland*: And any Usage or Custom in this *Kingdom*, against Tythes that are payable by the *Common-Law*, can be of no greater force here, than such a *Custom* wou'd be in *England*.

Our Author seems to have been very sensible of this; And therefore Endeavours to shew, that a *Custom* against Tythe of *Agistment* wou'd be valid in *England*. But I hope I shall be able to prove, that the Law is clearly otherwise.

It

It wou'd be endless to quote all the Authorities that might be found to support this Opinion. I shall only mention two or three; Having never met with any Authority against it.

The Learned *Selden*, in the 13th Chapter of his History of Tythes, says expressly, That ever since the *Parochial* Right of Tythes was Established in *England*, which was a little after the Conquest. The *Laiety* have been held incapable of being discharged from Tythes by *Prescription*.

It is expressly resolved in the Case of the *Bishop of Winchester*, which is reported by my Lord *Coke*, in the 2 Book of his Reports Fol. 44, an Author no way remarkable for being too great a favourer of the Clergy. That *prescriptions* in favour of the *Laiety*, against payment of Tythes, are not to be allowed, where there is no modus or Composition: And the reason of the Law, upon that Point, is there given in these Words.

“ The Law had great Policy herein; for the
 “ Decay of the Revenues of Men of Holy
 “ Church, in the end, will be the Overthrow
 “ of the Service of God, and of his Religion.

And my Lord *Coke* illustrates the Wisdom of the Law, in that Matter, from the Consequences of a Persecution which had robbed the Church of its Revenues; in these Words.

“ The Persecutor spoiled Spiritual Persons of
 “ their Revenues: And thereupon, in short
 “ time, did follow great ignorance of the true
 “ Religion, and Service of God; and thereby
 “ great decay of the Christian Profession, for
 “ none will apply themselves, or their Sons, or

“ any other whom they have in charge, to the
 “ Study of Divinity; when they shall have,
 “ after long and painful Study, nothing to
 “ live upon.

It appears in *Salkeld's Reports*, a Book of undoubted Authority, and one of the latest printed Reports we have, that it was resolved by the Court of King's-Bench, so lately as my Lord Chief Justice *Holt's* time, in the Case of *Hick* against *Woodson*, which is reported under the Tittle TYTHES, page 655. That *Custom* against *Tythe* of *Agistment* is void in Law. The Judgment of the Court is there reported, in the following Words.

“ *Tythe* of *Agistment* is due of Common
 “ Right; because the Grass which is eaten, is
 “ *de jure*, *Tytheable*; and must have paid
 “ *Tythe*, if cut at Perfection: And a Hun-
 “ dred or a County can't prescribe in *non deci-*
 “ *mando*, for a Thing that is, in its own Na-
 “ ture *de jure*, *Tytheable*: For as no one single
 “ Person or his Estate can, no more, by the
 “ same Reason, can the Hundred, which consists
 “ but of many single Persons Estates: But of
 “ things which are, in their Nature, not *Tythe-*
 “ *able de jure*, a Hundred or County may pre-
 “ scribe in *non decimando*: Because they are
 discharged in such Case, without a *Custom* to the
 Contrary. The Court allowed the Case of
 Wood, in *Roll's Abridgement*, to be good Law:
 Because Wood is not, in its Nature, *Tytheable*,
 nor within the reason of *Tytheable* things, which
 come not to Perfection every Year.

The Distinction taken in the Case above men-
 tioned, between Things that are, and Things
 that

that are not Tytheable by the Common-Law, reconciles all the Cases which I have been able to find concerning that Matter, and where it is commonly said in some Books, in general Terms, that a Country may prescribe in *non decimando*. It is to be understood of Things that are not, in their Nature, Tytheable; and all the particular Instances of such Prescriptions, which I have been able to find in the Law Books, relate to Things of that Sort.

Thus, in *March's Reports* Fol. 25, 26. There is an Instance given of such a Prescription, against Tythes of Pheasants; which are *feræ naturæ*, and therefore not Tytheable of Common Right. So, in *Roll's Abridgement*, an Instance is given of such a Prescription, against Tythes of Wood; and also, of a Prescription against Tythes of Ewes-Milk. Now, as to Wood, it is not Tytheable *de jure*; as appears from what has been already observed, and, as to Ewes-Milk; I can't find that the Milk of Sheep, Goats, Swine and the like, was Tytheable by the Common-Law: And the Reason of the Law herein, I take to be this: That the Milk of such Creatures was not usually preserved by the Owner. *Watson*, in his *Compleat Incumbent*, a Book of good Authority, page 555. of the third Edition in Folio printed in the Year, 1725, seems to be of the same Opinion, and to think that no Tythe is due of the Milk of such Creatures, when it is not preserved by the Owner. Besides, this further Reason might have had some Weight, with regard to Sheep: That they pay Tythes in another Way, *viz.* by their Wool, and in the others, by Pigs and Kids.

Tho' I have not met with any adjudged Case, where Prescription has been allowed against Tythes of Things that are in their Nature Tytheable; or, so much as an Opinion to that Purpose, in any Writer whose Authority has been admitted in our Courts of Justice; yet I can't say, but there may be some Opinions of that Sort to be met with among Writers of little or no Authority: And, indeed, there are many Things perfectly clear and certain in the Law, that have been denyed by such Authors. Thus, *Sir Simeon Degge*, in his Treatise called *the Parson's Counsellor*, says that a Custom of a Province, County or Hundred may discharge the Payment of Tythe of a Thing which is, *in it's own Nature*, Tytheable: But he does not support his Opinion by any Authority, he mentions the Case of *Wood*, as the Ground of his Opinion; which shews him guilty of another flagrant Error: It being clear and uncontroverted in the Law, that Wood is not, in it's Nature, Tytheable. But the Opinion of such Writers, supported in such a Manner, can have no Sort of Influence in the present Question.

Our Author quotes *Cokes 2d Institute*; where it is said that a Country may prescribe against Tythe of Wood, or any other Tythe. If my Lord *Coke's* Meaning be, that such a Prescription is valid against Tythe of Wood, or any other Tythe of like Nature, that is not due of Common Right; his Opinion is, beyond doubt good Law: But if his Meaning be, that a Country may prescribe against any Tythes whatsoever; There is no Authority mentioned to support it, but a Book called *Doctor and Student*, which

which treats of that Matter at large, in the 55th Chapter of the 2d Dialogue; and therefore my Lord *Coke's* Opinion, which he delivers very concisely, and without entering into the Reason of the Thing, is to be explained by the Treatise upon that Subject at large in *Doctor and Student*; And there the Question was, whether the Statute of 45 *Ed.* III. which took away Tythe of great Trees, was against Conscience or Religion: And it is there objected, that Tythes are due by the Law of God; and therefore no Statute, nor Prescription, nor Custom of the Realm against Tythes, can be valid: To which the Author Answers, that the Law of God requires every Man to give a reasonable Portion of his Goods Temporal to them, that minister to him Things Spiritual. But does not precisely require that the Tenth shou'd be paid for that Purpose; and he says, the Reason why the Christian Church Ordain'd the Tenth part to be paid, was, because there was no Cause why the People of the new Law should pay less to the Ministers of the new Law, than the People of the old Testament gave to the Ministers of the old Testament: But yet, since the Tenth was not expressly required by the Law of God under the new Testament, he is of Opinion that humane Laws have a Power over it: From whence he concludes, that a whole Country may prescribe against Tythes, both of Corn and Grass, and all other Tythes, provided the Clergy have a sufficient Portion besides: For, says he, *it were hard to say that all the Men of Italy or of the East Parts be damned, because they pay not Tythes*: From whence his Meaning appears

appears clearly to be, that the common or Statute Law of any Country, on their receiving the Christian Religion, may, without Violating any express Law of God, Establish any other Reasonable Method of Subsisting the Ministers of the Gospel in stead of Tythes: But it by no means follows from thence, that, after Tythes are Established in any country by the common Law of the Nation, any Part of such a Country can discharge it self from Tythes by any Custom or Prescription, in Contradiction to the common Law of the Land.

Our Author quotes the 15th of the *Articuli Cleri* exhibitted by Arch-Bishop Bancroft, and the Answer of the Judges, to shew that Prescriptions were then allowed in *non Decimando*.

The Sense of the Article and the Answer is no more than this.

“ The Temporal Judges, *say the Clergy*,
 “ pretend that we are not content in our Spiritual Courts with over-ruleing Customs in
 “ *non decimando*. But also disallow of Customs
 “ *de modo decimandi*: whereas, the truth is,
 “ that we allow of all lawful Customs concern-
 “ ing Tythes.

The Judges make Answer; that “ where
 “ Suits have been in the Spiritual Courts for
 “ Tythes in kind, they have been always pro-
 “ hibited by the Temporal Courts, where any
 “ *Modus Decimandi* appeared, or any Compo-
 “ sition or Agreement, whereby something has
 “ been given in discharge of Tythes, or to al-
 “ ter the manner of Tything: Because all Pre-
 “ scriptions and Compositions in these Cases
 “ are to be tryed at the Common Law.

Now,

Now, for my Part, I can't Imagine how our Author cou'd infer from the above mentioned Article or the Answer to it, that Custom or Prescription was then allowed in *non decimando*: I think it clearly implys the contrary; For it appears from the whole Import of the Answer, that the Judges intended to mention the several Causes Grounded on Prescription or Composition, on Account of which the Temporal Judges prohibited Suits for Tythes in the Spiritual Courts; And if the Temporal Courts had at that Time granted Prohibitions on Account of Prescription in *non Decimando*, the Judges wou'd no doubt have mentioned Such Prescription, as one of the Grounds of *Prohibition*, as well as Prescription in *modo Decimandi*.

Our Author is of a Opinion that whatever the Common Law might have been touching Prescriptions in *non Decimando*, such Prescriptions are confirm'd by the Statute of 2d Ed. 6. C. 13.

The words of the Statute which our Author relies on, come in under a Proviso, and are these “ That no Person shall be compelled to
 “ pay any Manner of Tythes for any Lands
 “ Tenements or Hereditaments, which by the
 “ Laws and Statutes of this Realm, or by any
 “ Priviledge or Prescription, are not chargea-
 “ ble with the Payment of any such Tythes.

If the Statute had intended to Confirm Customs which were void by the Common Law, so material and so important an Alteration in the Law wou'd scarce have been introduced by
 way

way of Provifo; which, *ex Vi termini*, Imports no new Right, but a faving of the Old.

My Lord Coke in his 2d *Institute* explains the above Provifo in this Manner; He fays that under the word *Laws* are comprehended Quarrys, Marl, and the like, which are exempted from Tythes by the Common Law: under the word *Statutes* are comprehended the Lands of fome of the Religious Houfes that had been diffolved in the Preceding Reign; For thofe Lands having been exempted from Tythes, whilft they continued in the Poffeffion of the Religious Houfes, that Exemption was continued to the Lands of fome of thofe Houfes, by the Statutes which diffolved them: By the word *Priviledge*, he fays, are taken in the Lands of certain Orders, fuch as the *Ciftercians*, *Hofpitallars* and *Templars*, which were exempted from Tythes by a Privilege granted to them by the Council of Lateran, and allowed by the general Confent of the Realm: And he fays, that by the word *Prescription*, *Modus's* are underftood. So that the Senfe of the above Clause, according to my Lord Coke's Explanation, is no more than this; That no Tythes fhall be paid any where for any thing which is difcharged from Tythes either by the Common or Statute Law, or by any Priviledge granted by the Common Law to any Religious Order, or by any *modus Decimandi*: But it did not enter into my Lord Coke's Thoughts that the Statute cou'd ever be underftood to confirm any Cuftom againft Tythes, that was a void Cuftom by the Law of the Land: Indeed the whole Purport and Tenor of the Act is for the Benefit of the

the Clergy, and to encourage and promote the Payment of Tythes.

But, says our Author, it is inequitable that all Customs shou'd be valid, which favour the Clergy, but none that make against them.

If that were really the Case, perhaps there might be some Reason to complain; But in Truth the Clergy of these Kingdoms have lost by Customs and Prescriptions much more than they have gained; As will be Evident to any one, who considers the several small Sums that have been Etablised in many Places, by immemorial Usage, in lieu of diverse Kinds of Tythes, which accordnig to the present Value of Money, are in no Sort an adæquate Satisfaction for the Tythes in Kind.

Præscription gives a Right upon this Principle that the continual Enjoyment is evidence of a lawful Commencement, founded on the Agreement of the Parties interested. Tho' the written Evidences of the Right may have been lost by Length of Time: And no Custom or Prescription is good, that cou'd not have had a lawful Beginning. Now tho' the Clergy had a Power by the Common Law to alien the Revenues of the Church, yet those who exercised that Power were guilty of a Crime in *foro conscientie*; And the lay Men who purchased those Revenues were Partakers in the Guilt; And this might be one of the Reasons why a Custom of not paying Tythes, or any thing in lieu of them, was disallowed by the Common Law: and besides, it wou'd be hard that the Neglect of a Parson, who has only an Interest for his Life in the Benefice, shou'd prejudice his Successor;

cessor; And if Customs of that Sort were allowed, an indolent or dishonest Parson might lay such a Foundation for an Usage of that kind, as might very possibly be imposed upon his Successor for an Immemorial Custom: But as none of those Reasons can be urged against Customs that Favour the Clergy, and as such Customs stand upon the general Reason of all other Lawful Customs, it is just and Equitable that *Custom* shou'd be allowed to give a Right to the Clergy, tho' there are some Customs against the Church which the Law, for some Special Reasons, disallows of.

But admitting every thing our Author has said in Favour of Prescription against Tythes, it wou'd have no Weight in the present Question: Because *Tythes* of *Agistment* or Pasturage are payable in this Kingdom by Act of Parliament, as well as by the Common Law.

The Statute of 33. H. 8. Sess. 1. Chap. 12. Recites, “ That many Persons inhabiting in
 “ Sundry Countrys and Places of *Ireland*, not
 “ regarding their Dutys to Almighty God,
 “ but in few Years past more contemptuously,
 “ and commonly presuming to offend and In-
 “ fringe the good and wholesome Laws of this
 “ Land of *Ireland*, than in Times past hath
 “ been seen or known, have not letted to sub-
 “ tract and withdraw the Lawful and *accus-*
 “ *tomed* Tythes of Corn Hay Pasturages and
 “ other Sorts of Tythes and Oblations; And
 “ *Enacts*, that all Persons of the Kingdom of
 “ *Ireland* shall fully, truly and effectually di-
 “ vide, set out, yield and pay all and singular
 “ Tythes and Offerings *aforesaid*, according to
 the

“ the lawful Customs and Usages of the Pa-
 “ rishes and Places, where such Tythes or Du-
 “ tys shall arise or become due.

I believe no one will say, that, because the Statute directs the several Sorts of Tythes to be paid According to the several lawful Usages and Customs of the respective Parishes, it therefore establishes any *unlawful* Custom of withholding Tythes intirely: For those words clearly relate to the Manner or *modus* of paying Tythes, and not to the *unlawful* Custom of not paying Tythes at all: The whole Import and Tenor of the Statute is to Encourage and promote the due Payment of Tythes; and there is not the least room to imagine that the Statute intended to establish any Custom or Prescription against Tythes, that was void by the Law as it stood before the making of the Act.

It appears clearly from the Statute above quoted, that *Tythe* of *Agistment* or Pasturage was once accustom'd in *Ireland*; which intirely destroys the Argument of immemorial Usage and Prescription against it, so much rely'd on by our Author; For my Lord *Coke*, in the 115th Page of his first Institute, lays it down as an undoubted Truth clear and uncontroverted in the Law, that no Usage whatsoever has the Force of an Immemorial Custom or Prescription, where it appears by sufficient Proof either of Record or Writing, that it was ever otherwise: And he there Expressly says, that an Act of Parliament is sufficient Proof for that Purpose; Nay, that it is the highest Matter of Record, and the highest Proof in the Law: But as this is a Matter as certain and as well known as any thing

Thing in the Law, it wou'd be needless to quote Authorities in Proof of it.

Thus we see, the Foundation upon which all the Objections against Tythe of *Agistment* are built, is intirely removed, and that the only Argument, which can with any Colour be urged against *the Right* in this Case, is quite overthrown. And upon the Whole I think we may fairly conclude, that the Right in the present Case, is as clear and certain, as the Right of any lay Man to his Estate; and that if the Common-Law of the Land, declared and confirmed by Act of Parliament, can give an *undoubted* Right; If the concurrent Opinions of all the Judges of our Laws in all Ages, as far back as we have any written Evidence of the Law, can put any Matter of right beyond *doubt*; The Clergy of *Ireland* have an *undoubted* right to Tythe of *Agistment*. Let the Impartial Reader then Judge, with what Colour our Author cou'd say, *that the Right in this Case depends upon a General Maxim, built on a false Supposition, and of undetermined Extent.*

I believe our Author was aware that his Arguments against the Right to the Tythe in Question cou'd not be supported; and therefore has Recourse to another way of arguing upon that Subject.

No Property, says he, can stand before a strict Construction of the Common Law; and therefore our Constitution has appointed Courts of Equity and good Conscience, which being duely aided by Acts of Parliament, moderate the Rigour of the Common Law. And he instances the Statutes of Limitation, which have been made to quiet Possessions in private Property; and seems to think

Think that the Demand of *Tythe* of *Agistment* in this Kingdom, being made against Purchasers for valuable Consideration without notice, ought to be barr'd by our ordinary Courts of Equity; or at least by the Legislature; which he seems to consider for this purpose as a Transcendental or extraordinary Court of Equity, whose business it is to carry matters of Equity higher and further than the ordinary Courts of Justice take upon them to do.

This indeed is a plausible Way of Speaking; but when it comes to be consider'd, it will be found to have no sort of weight in the present Question.

Our Author seems to mistake the Nature and Design of Courts of Equity in our Constitution: Those Courts don't in any Instance whatsoever take away any Right which any *honest* Man has by the Common Law of the Land; nor were they ever intended for any such purpose: Their proper Business is to relieve honest Men against Fraud and Circumvention; and to carry Considerations of that Sort, in their Decisions of Property, further than the strict Forms and Methods of proceeding in the Common Law cou'd well allow; and for that Reason they are call'd Courts of *Conscience*: But every one who is in the least Conversant in the Principles of those Courts, knows, that no Court of Equity ever protected any Person whatsoever against an honest Man, who had a legal Right by the Common Law of his Country. Courts of Equity do indeed *refuse to give their Aid* against an *honest* Purchaser without Notice; and they do so, upon this Principle, that where both Parties are

honest, those Courts do not interpose at all, but suffer the Common Law in such cases to take it's Course; and leave the Party to his remedy in the Common Law Courts; or if they do interpose, they determine according to the Principles of the Common Law; But there is a Wide difference between a Court of Equity's *screening* or *protecting* a Person from a Demand that may be made against him in a Common-Law-Court; and it's refusing to give Relief against that Person. It is not consistent with the Practise of any Court of Equity, nor indeed with the natural Principles of Reason and Justice, that any Man in any Circumstances, shou'd be protected by any Court of Justice whatsoever, whether ordinary or extraordinary, against the just and honest Right of another, which he may have a Remedy for in another Court.

Purchasers without notice of the Right of Tythes, are so far from being intitled to any special Protection, or extraordinary Favour from the Legislature, that they are not even intitled to the common Regard that is shewn by Courts of Equity to Purchasers without Notice of a private Right. For there is a manifest Difference between a Purchaser without Notice of a Right which arises from a private Deed or Family-settlement, which the Purchaser had no way to come to the Knowledge of; and a Purchaser without Notice of a general Right, which affects all the Land in the Kingdom; and arises from the Common Law of the Country, which every Lawyer in the Nation cou'd have informed him of, if he had been at the trouble of asking.

I can't

I can't imagine how the Statutes of Limitation cou'd enter into our Authors thoughts upon this Occasion; surely he can't think those Statutes are an instance of the Legislatures interfering in private Property. It appears from one of our oldest Books in the Law, called the *Mirror*, Chap. 5. Sect. 1, that Suits were, in general limited by the Common Law to a reasonable Time; and the Statutes of Limitation, conforming to the Reason of the Common Law, have fix't the Time for prosecuting the several Kinds of Suits, which the Common Law did not precisely determine: And none of those Statutes extend to Persons that were not barr'd by length of time by the Common Law; such as Ideots, Infants, &c. and there is an express saving for the Rights of the Clergy in our *

B 2

Statutes

* The Clause in the Statute is in these Words.
 “ Provided also and be it further enacted and declar'd
 “ by Authority of this present Parliament that this
 “ Act, or any Clause, Article, Sentence or Matter
 “ therein contain'd, shall not extend unto any Castle,
 “ Honors, Manors, Lands, Tenements, Heredita-
 “ ments, Tythes, Pensions, Portions, Obventions,
 “ Oblations, or any other annual casual or hereditary
 “ Profits or other Rights or Possessions whatsoever, of
 “ any Arch-Bishoprick, Bishoprick, Deanry, Arch-
 “ deaconry, Prebend, Parsonage, Vicarage, or any
 “ other Ecclesiastical or Spiritual Living, or as be-
 “ longing or appertaining thereunto, claim'd by any Ec-
 “ clesiastical or Spiritual Person or Persons whatsoever.
 “ But that they and every of them, their and every of
 “ their Successors, shall and may have, maintain and
 “ pursue, all and singular such Writs Actions and
 “ Suits,

Statutes of Limitation of 10. Car. 1. Sefs. 1. C. 6, and indeed the Common Law touching Prescription againſt Tythes, being founded on great Wiſdom and Policy, it wou'd be a groundleſs and pernicious Innovation to alter it. But admitting it were now reaſonable to make a Statute of Limitation for that Purpoſe ; was there ever a Statute which took away the Right of any Man, in regard to the length of Time already paſt ? Do's not every Statute of that Sort give a reaſonable Time after the making of the Act, for Perſons to Commence their Suits, who have any legal Right at that Time ? And wou'd not any Statute that were otherwiſe, be a direct Violation

“ Suits, for any of the Rights or Poſſeſſions of any of
 “ their Churches, and make ſuch Entries there into
 “ in ſuch like Manner and Form to all Intents, Con-
 “ ſtructions and Purpoſes, as they or any of them
 “ ſhou'd or might have, had, done, made, or purſu'd
 “ before the making of this Act, and as though the
 “ ſame Act had never been made.

And here I can't help obſerving that the Word, DECLARED, in the above Proviſo, ſhews it was *declaratory* of the Common Law ; indeed, the Proviſo ſhews that the Common Law in that Point was agreeable to the Senſe of the Nation, as well after the Reformation as before. And this may ſerve as an Answer to what has been ſuggeſted by ſome Perſons, *that the Common Law touching the Matter in Queſtion is a Remnant of Popery*. If the Principles of the Common Law, are to be branded with the Name of *Popery*, becauſe they had their Riſe before the Reformation ; ſuch Doctrines will unhinge all the Property both of this and the neighbouring Kingdoms. But Arguments of this Sort are ſcarce worthy of Notice.

Violation of private Property; which always was, and ever must be *Sacred* and *Inviolable* to a *free* People?

Our Author seems to have been sensible that the Doctrine is in general true, that the Legislature have not a Right to interfere in matters of private Property; and wou'd therefore endeavour to shew, that the Legislature have formerly interpos'd in Cases of Tythes, for which Purpose he mentions the Statute of 45. *Ed.* III. which took away Tythe of Timber-trees; and the Statute of II. *Ed.* 6. C. 13, which abolish'd Tythe of Marriage-portions, that had by Custom prevail'd in some parts of *Wales*; and the Statutes made in the Reign of *Hen.* VIII. which took away the Possessions of Religious Houses; and the Statutes of *Mortmain*. I can find no other Statutes, besides those above mention'd, that can with any Colour be urged in the present Question, save only the Statute which establishes a *Modus* in *England* of 5*s.* *per.* Acre for the Tythe of Flax and Hemp; and 2. and 3. *Ed.* VI. C. 13. which, for encouraging the Improvement of barren Ground, exempts such Land from Tythes, for seven years after it is improv'd, provided it was so barren as never to have yielded any Tythes before.

I shall consider all these Statutes in their order, and shall endeavour to shew that they can have no Sort of weight for our Author's purpose.

As to the Statute of 45. *Ed.* III. C. 3. it extends only to great Trees, and does not take away any thing which the Clergy had a Right to before; for it is declaratory of the Common Law, as appears from the Authority already

quoted in *Salkeld*: The same also appears from *Doctor and Student*, a Book of great Authority, in the 55. C. of the 2d *Dialogue*, where it is expressly held, that no Tythe of Trees was payable by the Common Law, tho' it was otherwise of the Fruit of Trees; and that tho' Tythe of Under-wood was payable by the Customs of some particular Places, yet Suits for Tythe of great Trees were generally prohibited before the Statute; the same appears from many other Authorities, and indeed from the very Body of the Act it self: For the Words of the Enacting part are these. *It is Ordain'd and Establish'd that a Prohibition in this Case shall be granted, and upon the same an Attachment, AS IT HATH BEEN US'D BEFORE THIS TIME.*

It may be possibly urged, that some Doubts and Disputes must have arisen at that Time touching the Tythe of Wood, otherwise there wou'd have been no Occasion for the Statute; and that as in former Ages, where doubts have arisen touching the Rights of the Church, the Legislature for the Peace and Quiet of the Realm, have interposed and removed those Doubts by Statutes explanatory of the Law, so the Legislature may properly interpose in the present Question.

To this it may be Answer'd; that the Right to Tythe of *Agistment* is clear and Certain; but admitting it were doubtful: The Legislature never did, nor can they ever Justly, nor will they, I presume, ever interpose in Questions of that Sort. I do allow that where Disputes have arisen in former Ages between the Clergy and Laity concerning the Rights of the Church, the
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one insisting on the Canon, and the other on the Common-Law: There the Legislature have interpos'd, and for the Peace and Quiet of the Realm have publish'd and affirm'd the Common Law; and upon this Foundation it was, that the Statute of 45. *Ed. III.* above mention'd, was made: But in that Case the Common Law was clear and Uncontroverted, and the Disputes arose on the Difference between the Canon and Common Law: For the Clergy in those *Papish* times, having assum'd to themselves a Power of making Canons touching the Payment of Tythes, and Arch-Bishop *Stretford* having before that Time actually made a Canon for Tythes of Wood, as appears from *Seldens* History of Tythes, the Legislature thought proper to support the Common Law, in Opposition to the Practice of the spiritual Courts founded on Canons made in Contradiction to the Law of the Land. But surely this can't, with any Colour, be call'd an Interposing in any Question or matter doubtful in Law touching private Property. No, the Legislature ever did, and I hope, ever will leave Matters of that Sort to be determin'd in an ordinary Course of Justice, by the Judges of the Laws, whose proper Business it is to discuss and decide Questions of that Kind.

As to the Statute which took away Tythe of Marriage-portions in *Wales*; I take it to have been also declaratory of the Common Law; and I think the same appears from the Statute itself; the Case as it there appears was no more than this.

When Lands in *Wales*, thro' civil Dissention, lay untill'd; the Tythes arising from Pasture were found insufficient to maintain the Clergy; and therefore an Usage prevail'd there, of Tything Marriage-portions; which at that Time was tolerated from the Necessity of the Thing: But when the Country became improv'd by Tillage, and the Reason of the Usage was by that Means taken away, the Custom became unreasonable, and consequently void by the Common-Law; according to the Maxim quoted by our Author, *Cessante ratione legis, cessat ipsa lex*. And to prevent the spiritual Courts from insisting on the Custom in Opposition to the Common Law; the Legislature thought proper to declare the Custom unreasonable, and consequently void. Indeed I think our Author had better have omitted this Statute, which shews that Customs the most opposite and dissonant to the Nature of Tythes, have been indulged in Favour of the Clergy; rather than that they shou'd want a competent Maintenance.

The Statutes which took away the Possessions of Religious Houses in the Reign of *Hen. VIII*, can't be urged as an Instance of the Legislature's taking away the private Property of the *Subjects* of the Realm. For these Religious Orders, after the Reformation, did not deserve to be treated as *Subjects*; in regard that they adher'd to a foreign Jurisdiction, which the Reformation had utterly abolish'd.*

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* The Legislature, in all Countries, hath beyond question a Right to suppress and Abolish all orders of
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As to the Statute *Mortmain* of *Ed: I.* It took away no Man's property: The Purport of the Statute is to restrain all Bodies Politick, as well *Temporal* as *Spiritual*, from purchasing Lands; and the Reason is given in the Statute itself; that Lords by such Purchases lost their Escheats and Military Services, which were provided for the defence of the Realm. I can't say but the Statute had a particular View to the Clergy; and indeed I think the Laity in those times had just Cause to be jealous of the Wealth and Power of an Order of Men, who own'd a foreign Jurisdiction, and sent great Part of their Wealth to *Rome*.

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of Men that are hurtful to the Community; as was done in the Suppression of Monasteries; and also to curb and restrain the Wealth and Power of all sets of Men, whose Wealth and Power may hurt the whole Body; as was done by the Statutes of *Mortmain*, yet so tender was the Legislature of Property, in the Reign of *Hen. VIII.* That tho' the Reformation in Religion, absolutely requir'd that those Houses of Superstition shou'd be suppressed: Tho' it was Necessary for the common Good, to check the Wealth of a Set of Men, whose Religion led them to send a great Part of their Wealth to a foreign Country, without bringing any thing back in return for it, but *Popish Bulls* and *Indulgences*: The Legislature, Notwithstanding, did not interpose, until the Members of those Houses had actually executed grants and Surrenders of their Estates and Possessions to the Crown; in Consideration of which, the King granted them Pensions or made some other Provision for them during their Lives.

As to the Statute in *England* which gives a *Modus* for *Tythes* of *Hemp* and *Flax*, it does not, extend to Land formerly sown, there being an Express saving in the Act for that Purpose; so that it was not to the Prejudice of the Clergy; or if it was, the Loss was trifling and inconsiderable, *de minimis non curat Lex*: But can this with any Colour be compar'd to the taking away from the Clergy of *Ireland*, *Tythe* of *Agistment*, which in many parts of the Kingdom, is vastly more valuable than all the other *Tythes* that arise in those Parts.

As to the Statute which exempted barren Land improved by *Tillage*, from *Tythes*, for the first seven years after the Improvement, it extended by the express Words of the Act, only to such Lands as were so barren that they never yielded *Tythes* before; and therefore as it was made for the Encouragement of *Tillage*, it was in Effect for the Benefit of the Clergy.

I have gone thro' all the Statutes I cou'd find, that can with any Colour be urged on this subject; and it is evident they don't in any sort influence the present Question: And I think I may venture to say, that there cannot a single Instance be given, in this, or any other *Free Nation*, where the Legislature, or any particular Branch of it, have interpos'd in Matters of Property, or obstructed the ordinary Course of Justice in Questions of that Sort; much less have they taken away the private Property of any particular Man, or Body of Men, that were regarded as Subjects of the Realm, without giving them a reasonable Equivalent, tho' even the Publick Good requir'd such Property to be taken away.

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Our Author wou'd willingly persuade himself, that House Money, Trades Money, and such other Tythes as depend upon the Customs of particular Places, and are not due by the Common Law; were Originally given in this Kingdom to supply the want of *Tythe of Agistment*: But this is a meer Conjecture without any Foundation of Reason to support it. Are not such Tythes, as our Author mentions, given in *England*, where the Tythe in Question is universally paid? Nay, don't they chiefly prevail in Parts of this Kingdom, where *Tythe of Agistment* is least wanted? and in Villages and Towns, were that Tythe cou'd not naturally arise?

I don't very well understand what our Author means by saying, *that the Appointments assign'd to any part of the Church for publick Services, are possessed in trust for the good of the whole Community*. If he wou'd thereby Insinuate, that the Clergy are to be consider'd in the same Light with Officers who have civil Employments; I can by no means agree with him: Every one who is in the least Conversant with our Laws, knows, that the Christian Religion is supported by the Law of God, and the Common Law of *England*; That Offences against it are punishable by the same common Law; That it is an Essential Part of our Constitution; And that the Legislature have neither Right nor Power to abolish it. With what Foundation then can Christianity be compared to the Business of a Civil Employment, or the Ministers of it to Civil Officers, who are meer Creatures of the State, may be new modell'd at the Pleasure of
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the Prince, and most of them intirely abolish'd without hurting our Constitution?

But admitting the Ministry of the Gospel to be a meer civil Employment, even that Concession wou'd not serve our Author's Purpose. If he be of Opinion that the Legislature can justly lessen the Salarys of the present set of Judges in *England*, or of any other Officer either in *England* or *Ireland*, who is Entitled to his Office for Life: I believe all Persons, who are in the least Conversant in the Laws of these Kingdoms, wou'd be perfectly unanimous against such an Invasion of Property.

Admitting that the Legislature hath such a Power, what wou'd induce them to exert it in the present Case? Leaving the Support of the Clergy intirely out of the Question, is it of any Consequence to the Publick, whether this or that particular Man be intitled to this or that particular Rent-Charge, or other Profit arising out of any particular Farm or Parish? Wou'd not the abolishing *Tythe* of *Agistment*, be, to take the Benefit of it from one private Man, and transfer it to another, from the Parson to give it to the Land-lord? No body can doubt, that if *Tythe* of *Agistment* or any other Tythe, were taken away, Landlords wou'd set their Lands Proportionably higher; As we see at present in the Case of Impropropriators: And I must submit it to the Publick, whether it wou'd contribute to the Benefit of *Ireland*, that a Number of Men, who expend their whole Income in the Kingdom, shou'd have Part of their Revenues withdrawn from them, to be transferred to
another

another Set of Men, many of whom consume their whole Fortunes in other Countrys.

Admitting, that the Revenues of the Clergy might justly be lessen'd, in regard *that they are given them for publick Services*, as our Author expresses it; Will that Reason extend to lay Patrons and Impropriators, many of whom have Estates of Inheritance, in Fee Simple to them and their Heirs for ever, in Tythes and Advowsons? Have not Men as good a Right to those Estates, as to their Estates in Land? Or can there be any Reason assign'd, why the Legislature shou'd have a greater Power over the one, than the other?

Our Author seems to think, that the Endowments of *Regulars*, shews that Tythes were more than sufficient for Support of the Parochial Clergy; That the Clergy of *Ireland* are more amply provided for than the Clergy of *England*; And that the taking away *Tythe of Agistment*, wou'd be the most proper Method of lessening the Revenues of the Church, because it doth not, like other Tythes, bear a Proportion to the Profit of the Farmer; and therefore is not calculated according to the common Rules of Justice; And because it cannot be paid in Kind, and must therefore in it's Nature occasion Law-suits, and give the Clergy an Opportunity of oppressing the Laity, and extorting more Money from them than the Tythes are worth; and also because *it operates, on the prevailing Humour of the Protestants deserting their Country.*

As to the Endowments of *Regulars*; The Consequence our Author draws from those Endowments, must appear very Extraordinary to
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any Person who is at all acquainted with the History of those Times: For it there appeareth, that where ever Regulars were endow'd with Tythes, they Originally were the Parochial Clergy. As to the Difference which is pretended between the Provision for the Clergy of *Ireland*, and that for the Clergy of *England*; Every Body knows that the common Law concerning Tythes, is the same in both Kingdoms; And that there is very little Difference, in the Benefit arising to the Clergy from the Customs of particular Places in each Kingdom: whence it follows, that the Provision for the Clergy of both Kingdoms, may, in a *Moral* or *Political*, tho' perhaps not in a *Mathematical* way of speaking, be justly called the same: And *Ireland* can no more be said to differ from *England*, with respect to the Provision for the Clergy, than any particular Part of *England* can be said to differ from the rest of that Kingdom in that respect: And tho' the Parishes of *England*, by means of the great Number of Inhabitants, may possibly in some Places be smaller both in extent and Value, than several Parishes in *Ireland*; Yet it can no more be inferred from thence, that the Provision for the Clergy of *Ireland* ought to be lessen'd, than the same Consequence can be drawn with Respect to different Parts of *England*, where the Parishes are larger, and the Inhabitants fewer in some Places than in others: The Consequence I think wou'd be equally wrong in both Cases; For what is now thinly inhabited, may perhaps be quite otherwise in the Compass of a few Years.

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Tho' the Maintenance of our Clergy be generally larger than that of the Clergy in *England*, it is not because the Church is more amply provided for here than in *England*, but because the Number of our Clergy is much smaller in Proportion to the Number of our Inhabitants, and many of our Parishes are often united in one Hand. The Number of People is computed in *England* to seven Million: In *Ireland* to two Million. The beneficed Clergy in *England* are Ten Thousand: In *Ireland* but between seven and eight Hundred. If the Number of Clergy were as great in Proportion to that of the People in *Ireland*, as it is in *England*, it wou'd quickly appear that the Maintainance for them, at least in three of our Provinces was much less, where the Impropriations are numerous.

If the Rights of the Clergy were to be modelled by the Opinions and Humours of the Laity, according to every Change that might happen in the Circumstances of the several Parts of a Country; it wou'd have a direct and necessary Tendency totally to alter the Constitution of our Church, and to make the Clergy intirely dependant on the good Will of the People. Some general Method of subsisting that Order must be adher'd to; and it is impossible to establish any one for that purpose, that will equally fit all Countrys, or all particular Parts of the same Country in all Circumstances.

But admitting that our Clergy have too much, wou'd it be reasonable, or expedient, or just, to abolish intirely any one Species or Branch of Tythes; whereby the Clergy of some particular Parts of the Kingdom, wou'd be greatly affected, and those of other Parts at present Scarce affected

affected at all; and that possibly might in it's Consequences, leave some of the Clergy quite destitute of Support? And have we not already found by Experience, that several Benefices in this Kingdom, some of which are not far removed from the Metropolis, have fallen one half, and others more than two Thirds in their Value, since the present Incumbents became first intitled to them, by means of the Inhabitants turning their Lands from Tillage into Pasture? Is the taking away the *Tythe* of *Agistment* the way to encourage Tillage among us, which is so much wanted in this Kingdom, which wou'd fully employ all our Idle Hands, and the want of which carries so much ready Money out of the Kingdom; and lessens the Benefit arising from our Exports. If I am well Informed there went near two Hundred Thousand Pounds out of this Kingdom last Year for Corn; and it has been computed that Sixty Thousand Pounds *per. Ann.* at a Medium of four Years last past have gone out of the Kingdom for that Commodity; the Tythe of which wou'd amount to Six Thousand Pounds a Year.

Wou'd not the discouraging Tillage, discourage the Linnen Manufacture? And can any thing which discourages that Manufacture be for the Interest of *Ireland*?

But, says our Author, Tythes of Herbage are not just, because they may be demanded in a bad Season, when the poor Farmer makes no profit at all. This way of reasoning is indeed some what extraordinary: May not the same Objection be made to the Landlords Rent. Is it
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not as great a Hardship upon the poor Farmer, to pay his Rent in a bad Season, when he has made no Profit by his Farm, as to pay his Tythes? And may he not reasonably expect as much Compassion, in such an unfortunate Season, from his Parish Minister who is acquainted with the Hardships of the Season, and the Circumstances of his Parishoners, as from a Land-lord who perhaps resides in another Kingdom, and leaves the Receipt of his Rents to an Agent? I think our Author might have considered that the yearly Value of Land, to be set to a Farmer, is a just Medium between the Profit that may reasonably be expected in good Seasons, and the Loss that is to be feared in bad ones; And that a Farmer has made a very bad Bargain, if the Profits of a good Season don't fully enable him, to pay both Rent and Tythes, in a bad one.

I own I'm surprized to hear any Argument against the Tythes of Herbage taken from the Nature of those Tythes. Surely they must in their Nature have been among the first and most antient Kind of Tythes, because they are the natural Produce of the Earth; and if Tythes of any Kind had never prevailed in this Island, but were now to be introduced, surely the Tythes in Question wou'd be regarded as the most reasonable and equitable Sort, wou'd not every one in such a Case allow that it wou'd be the highest Injustice to make the poor Farmer, who til'd his Ground with the Sweat of his Brow, pay a full tenth of the Produce of the Earth, including not noly his Industry and La-

bour but perhaps an expensive Manure ; while at the same time the rich Grazier, who hath large Tracts of Ground under barren Cattle, paid nothing at all ?

As to the Objection against *Tythe* of *Agistment*, that it must in it's Nature occasion Law Suits, because it cannot be taken in kind where the Parties disagree about the Value ; I don't think it has any Weight : For it appears from Experience in *England*, that where the Right of the *Tythe* in Question is not disputed, few Suits arise about the Value ; and it is well known that the Suits, we have had here for that *Tythe*, have not been owing to any Disagreement about the *Value*, but to a Dispute about the *Right*.

Our Author is apprehensive that if the *Tythe* of *Agistment* be continued, the Farmer will generally pay too much, for Fear of a Suit in the Exchequer : But I think there is greater Reason to apprehend that the Parson will generally accept of too small a Sum, rather than sue : And if we consider that out of Eight Hundred Benefic'd Clergymen in this Kingdom, not a Score of them, in 17 Years Time as I'm inform'd, have yet sued in the Exchequer for *Tythe* of *Agistment* ; we shall see no Ground, from their Behaviour, for such a Suggestion.

As to what our Author says with regard to the Humour of our Protestants deserting their Country ; I must submit it to the Consideration of the Publick, whether that Humour has not chiefly prevailed in Corn Countries, in the Northern Parts, where there is scarce any such thing as Pasturage of barren Cattle ; and whether

ther the taking away *Tythe* of *Agistment*, wou'd not raise the Rents, in Pasture Countries, upon Protestants from the North, who, from the great Number of Inhabitants in that Country, may be under a Necessity to look out for a Place of Residence elsewhere? and whether the taking away that Tythe will not therefore be an Occasion of *Protestants deserting their Country*? and whether that Spirit hath not been justly remarked to run highest, when Bread was scarcest among us, as in the Year 1728, and 1729? and whether, as Bread became cheap in the following three or four Years, the humour did not abate? and whether it has not of late revived with the Scarcity of Corn? and whether every thing that encourages Pasture and discourages Tillage, won't add to the Scarcity of that Commodity? and whether the turning Land from Tillage into Pasture will not leave the Tenants destitute of Farms, and force them out of the Kingdom? and whether it be more owing to the Landlords or the Clergy that so many Protestants have of late Years deserted their Country?

Our Author objects not only to the *Right* of the *Tythe* of *Agistment*, but to the usual Method of recovering it, he says, that by putting the Party to his Oath he becomes a Witness against himself at Common Law; and quotes the Statute of 2. *Ed.* 6. C. 13. whereby it is provided that the Party may be examined by all lawfull and reasonable means, other than his own corporal Oath, concerning the true Payment of personal Tythes.

It appears from the express Words of the Statute, that it extended only to the Spiritual

Courts; and to them only in Case of *Personal Tythes*: And perhaps it might be somewhat difficult for a Man to swear to the clear Gains he makes by his Trade or Profession; but can there be any such difficulty in forming a Judgment of the Value of a Man's own Farm: Have not Courts of Equity by the constant uninterrupted Usage of several Ages, examined the Party upon Oath in all things of that Kind, without any Complaint against them on that Score? And is not a Man in effect a Witness against himself at Common Law, wherever there is a Bill of Discovery in aid of an Action at Law?

Sure no one will call in Question the Jurisdiction of the Court of Exchequer in Cases of Tythes: It appears from *Selden* that the Jurisdiction of Tythes was exercised in both Courts, as well Secular as Spiritual, so early as the Conquest: And it is expressly resolved in *Hardress's Reports* p. 190. that the Exchequer has an Original Jurisdiction in Tythes.

But our Author objects, that Suits in the Exchequer for Tythes are tedious and expensive. What wou'd he infer from thence? Are not the Forms and Practise of that Court, in Cases of that Sort, the same as in all other Suits; and indeed pretty much the same with the Practise of Courts of Equity in *England*? If the Expence and Delay in that Case be a Grievance, is not the Grievance greater to the Persons who demand their Right, than to those against whom it is demanded? And is not the Delay and Expence in Equity Suits, for the most part chiefly

chiefly owing to the Defendant ; or will any one say that because the Method of recovering a Right is tedious and Expensive, therefore the Right itself ought to be taken away ? And is it not in the Power of the Legislature to find out a Method of making such Suits less expensive and more summary ? Why is the Court of Exchequer to be found Fault with upon this Occasion ? It is well known that the Court our Author mentions is now most happily filled ; and that there are Men at present upon the Bench who are universally agreeable to the whole Nation ? Yet our Author seems unwilling to submit the Matter in Question to their Decision ; to the Judgment of Men whose Business and Profession it is to Judge in Matters of that Sort ; and who are distinguished for their Abilities, Learning, and Probity. If I mistake not the Sense of our Author, no Court of Judicature upon Earth will please him in the present Case. No : The Legislature must *exercise the Plenitude of its Power* and utterly abolish the Right in Question : That wou'd be such a *Plenitude of Power* as I believe our Author wou'd disallow in any other Matter of Property.

One of our Author's principal Objections against the Tythe in Question is, built upon a Fact, in which he has been quite misinformed : He imagines that *Tythe of Agistment* has not been paid or demanded 'till of late in any Part of *Ireland* ; and upon this Supposition he argues thus : If *Tythe of Agistment* had ever been paid in *Ireland*, there wou'd have been some footsteps in so long a tract of Time, of it's having

been either paid or demanded; and if the Clergy had ever enjoyed it, they wou'd never have given it up; and the Silence of our Records in this particular is the strongest Argument against it.

This way of reasoning will no doubt have great Influence on many People; but must appear of no Sort of Weight to any one who is either acquainted with the History of *Ireland*, since the Reformation, or with the present Usage in many Parts of the Kingdom.

It is well known that the Reformation made a very slow Progress in this Island; that the reformed Clergy had but slender footing in this Kingdom for many Years after the Reformation, and were so little regarded by the Papish Natives that they cou'd not possibly insist upon their Rights any where, but in such Parts as where planted with Protestant Colonies from Britain; that there were few such Colonies any where but in the Province of *Ulster*; that those Colonies chiefly apply'd themselves to Tillage; But that in some Parts of that Province, where intire Farms have been usually kept for Pasture of barren Cattle, *Tythe* of *Agistment* is paid at this Day, and has been paid beyond the Memory of Man without the least Dispute about the Right, and Scarce any about the Value; for Land in those Parts being generally set to the under Tenants or immediate Occupiers, pretty near the full Value, the Clergy usually accept of a tenth of the Land-lords Rent for *Tythe* of *Agistment*.

As to the other Provinces; if any one will consider the unsettled Condition this Kingdom has been in, 'till of late; that the Rebellion in 1641 introduced the utmost Confusion, and unhinged more than half the Property of the Kingdom; That before things were well settled, the Protestants of these Kingdoms were under a Necessity of taking up Arms to rescue their Country from Popery and Slavery, which involved the Kingdom again in a Civil War, and unsettled a great Part of the Property of *Ireland*; that as soon as the Kingdom was tolerably settled, the Clergy began to insist upon their Rights, but found great difficulty in prevailing on the Laity to consent to things which, thro' the Calamities of the Times, they had been refused to; that the reformed Clergy until the Revolution, were almost every where intirely under the Power of Popish Land-lords, who had no regard at all to the Rights of the reformed Church; and that in Places where our Clergy were best treated, Land-lords generally extorted Bargains of the Tythes of the whole Parish on their own Terms, and Set their Land under an intire Rent, without making any Distinction between the Rent and the Tythes; I say whoever will give themselves leave to consider those Things will not be in the least surprized, that *Tythes* of *Agistment* have so far gone into disuetude in many Places, that it may at present be no easy Matter to trace them.

As to the Silence of our Records, insisted on by our Author; almost all the antient Records of our spiritual Courts have been intirely lost; and every body knows that those were the only Courts, where Tythes of any Kind were sued for in this Kingdom, until of late, that some Suits of that Sort have been brought into the *Exchequer*. Indeed if any Argument cou'd be drawn from the Silence of our Records, it wou'd extend as well to the Tythes of Corn, as of Pasture.

It is well known that there are many parts of this Kingdom, where no Tythe of Hay has been paid, nor any thing in lieu of it, in the Memory of any Man living; and according to our Author's way of Reasoning, it might be urged, that if the Clergy of those Parts had ever enjoyed Tythe of Hay, they wou'd never have given it up: But I believe the most Zealous Opposer of the Rights of the Church never imagined, that when Tythes were introduced into this Kingdom, the Tythe of Hay was left out.

There is one Objection more which I am told has been made to *Tythe of Agistment*, and indeed there is something like it in our Author; that there are many Industrious Farmers and improving Tenants who won't be able to pay their Rents, but will be obliged to surrender their Leases, if that Tythe be strictly exacted.

I can scarce think that this cou'd seriously be urged as an Argument in the present Question; the Argument is no more than this; that there
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are Land-lords in some Parishes who have set their Land at so high a Rate, that the Tenant is not able to pay both Rent and Tythes, therefore the Parson of the Parish ought to remit his Tythes, to enable his Parishoner to pay his Rent. I believe this Argument might in some places be extended further than Tythes of Herbage; but if such an Argument as this be capable of a serious Answer, this very obvious one may be given; that there never was, nor will there ever be a general Law, how just and good soever in itself, which by being strictly insisted on, may not be attended with private mischiefs and Hardships to some particular Persons.

I have considered all our Author's Objections to *Tythe of Agistment*; and indeed I think they are all that I have any where met with upon that Subject.

I shan't here repeat what has been already said touching the Causes of our *Northren Protestants* deserting their Country; but shall take a Transient View of the State of the *Protestant Religion* in the pasture Countries of this Kingdom.

Parishes in the pasture Countries have generally become of so small Value, from the late disuse of the Tythe of Herbage in those parts, that one Parish is in no sort a competent Provision for a Clergyman, as it was at first intended: This has made it necessary to unite diverse Parishes into one Living or Benefice, that the Parson might have a reasonable Support; and hereby many of the Livings in those parts have become

come of so large Extent, that it is impossible for a Clergyman to have half the Influence he might otherwise have, either by his Conversation or Example, upon the *Popish Inhabitants* of his *Benefice*, most of whom by the Distance of their Situation are quite remote from his Acquaintance and Neighbourhood; and it must be submitted to the Publick; whether this be not one of the principal Causes, why the *Protestant Religion* has made so slow a Progress of late in those Parts; and whether, if Tythe of Pasturage were chearfully and without Reluctance paid in those Pasture Countries, it wou'd not be thought proper to reduce Benefices in those parts to their original Limits, with a Saving for the Rights of the present Incumbents; and whether that wou'd not necessarily have a considerable Effect upon the *Protestant Interest* in those Countries.

It is very certain that every Beneficed Clergyman both in *England* and *Ireland*, has a *Freehold* in his Benefice; and it is as certain that the Property of all the Free-holders in these Kingdoms is equally secure and inviolable, and depends upon the same Laws: And if the Legislature hath Right to take away the Freehold of any particular Man, without making him a Recompence, it hath the same Right to take away the Freehold of every Free-holder in the Kingdom: It is impossible to set any Bounds, or to say, *thus far they may go* but no further.

Property is a tender Thing, and indeed can't well be touched without wounding the Constitution:

Constitution: It is secured to us in our happy Constitution by a Barrier against arbitrary Power, which I hope will ever be impregnable, whether that Power be exercised by one or by many; and therein does our Liberty consist.

The Property of a free People does not depend upon the arbitrary Will of any one Man or Number of Men, but is secured by Laws of which all the Members of the Community have an equal Benefit. That is the very Essence of Liberty, and indeed the sole Thing which distinguishes a free from an enslaved People. Some People have endeavour'd to weaken the Force of this reasoning, in the following Manner.

The taking away *Tythe* of *Agistment*, say they, cannot justly be call'd an Invasion of Property, because no Person enjoys it: And however unjust it might be in the Legislature, to turn any Man out of the Possession of his Estate, it is not equally unjust to bar a meer Right, by which no Person now living hath ever yet receiv'd any Benefit; and the abolishing the *Tythe* in Question would not lessen any Man's Income, but would only restrain the Proprietors of *Tythes* from enlarging their Fortunes.

To this it may be answer'd, that there are many Persons in this Kingdom in the quiet and peaceable Possession of the *Tythe* of *Agistment*: And admitting it were otherwise, the abolishing of that *Tythe* would lessen the present Income arising from other *Tythes*, because it would be an Inducement to turn Land from *Tillage*

lage into Pasture. But allowing that it would not be attended with any such Consequence, and that no Person now living had ever enjoy'd any Benefit from the *Tytbe* of *Agistment*, the Objection would have no Sort of Weight; for whatever a Man hath a Right to by the Laws of his Country, is his Property, whether he be in Possession of it or not. And there is the same Injustice in restraining a Man from recovering his Right, as in taking the Right from him after he hath recover'd it.

Bare Possession can never give a Right; long uninterrupted Possession is in general allow'd to be Evidence of a Right, because the Law in such Cases presumes, that the former owner would not have acquiesc'd, unless he had parted with his Right, and that the Possessor came lawfully into Possession by Purchase; or Gift from the ancient Proprietor, altho' his Title-deeds by length of time, may have been lost; but it appears from what hath been already observ'd, that Tythes, which are due by the Common-Law of the Nation, are for very wise Reasons an Exception from the general Rule, and that no Length of time can discharge Land from the Payment of Tythes, which are due of common Right; and therefore the Length of Time is not at all to be regarded in the present Question, and leaving that Consideration quite out of the Case, the want of Possession is so far from being an Argument against the *Tytbe* of *Agistment*, that it really is an Argument in it's Favour. For wherever a Person hath been long out of Possession of a Thing, which he hath an undoubted

doubted Right to, whether it were owing to Force, or Fraud, or Interest, or Power in the Person who with-holds it, or to an Unwillingness in the Person, who hath the Right, to be at the Trouble or Expence of prosecuting it in the Course of Justice; the remitting of the Right for the time past, is so far from being an Argument why it ought to be remitted for the time to come; that it is a very strong Reason why it ought now to be most readily and chearfully yielded, and given up to the rightful Owner.

From what hath been said on this Point, I think we may justly infer, that *Property* is equally sacred, and inviolable, whether the Possession, and the Right, be in one or in different Persons; and that if the Legislature hath a Right to abolish *Tytbe* of *Agistment*, it hath the same Right to abolish all other *Tytbes*, and also to take away all *Glebes* from the Clergy, and turn them out of their Houses; and if it hath a Right to strip the Clergy of their Possessions, and leave them quite destitute of all maintenance and Support, it hath the same Right to turn every lay Man in the Kingdom out of his Estate.

I am vastly surpriz'd why the Clergy, in the Writings of some Authors, are considered in a different Light from the Laity, with regard to the publick Good.

Have not the Clergy one common Interest with the Laity? Are they not our Country-men and fellow Subjects? Are they not Part of ourselves, our Fathers, Sons and Brothers? are they
not

not link'd and united to us by all the Ties both of Nature and civil Polity? How then can we regard them as Men of distinct Views, or distinct Interests from ourselves?

Indeed it was quite otherwise in *Popish-times*; the Clergy in those times were united to a *Foreign Interest*, and own'd a Foreign Jurisdiction: Their very Religion made them so many *Bosom-enemies* to the State: The tyrannous and bloody Principles of the *Church of Rome* inflamed them into such Cruelties, and intolerable Oppressions. That some *Protestants* at the *Reformation*, from the *Horror* they had conceived of such a Clergy, threw off in a manner the whole Order; and from an Indignation against the *Papal Hierarchy*, abolish'd *Episcopacy* itself. This Error was avoided by our Church; and surely no Member of the *Establish'd Church* of this Kingdom, can entertain such a way of thinking; concerning *Episcopacy* or *Episcopal Clergy*. No, our Religion is such as hath fully secured us against *Papery*; and the late happy *Revolution* brought about by our Deliverer, of ever glorious Memory, hath fixt both our Religion and Liberty upon a solid and lasting Foundation.

I must here beg leave to repeat what I before said, that I have had no Sort of Interest in the present Question but the common Good. The Ferment which has arisen upon this Occasion, and is too likely to increase, must give real Concern to every Lover of his Country: And surely there is no Man who can lay any Claim to that Character, but wou'd most readily contribute his best Endeavours to compose those unhappy

happy Animofities, which I am afraid are not likely to fubfide, unlefs fome *Cool-men* will interpoze their Temper to allay the Heat, and contrive fome reasonable and moderate Scheme; that may fecure the Laity againft any exorbitant Demands, that may poffibly be made either by *Clergymen* or *Impropriators*, and at the fame time preferve PROPERTY OF EVERY KIND; SACRED AND INVIOABLE.

F I N I S.





